

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

March 21, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 95-1299**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**JANE I. PECKHAM,**

**Defendant-Appellant.**

APPEAL from an order of the circuit court for Dane County:  
ROBERT R. PEKOWSKY, Judge. *Affirmed.*

Before Gartzke, P.J., Dykman and Sundby, JJ.

PER CURIAM. Jane I. Peckham appeals from an order denying her second postconviction motion. The issues are whether Peckham provided a sufficient reason for failing to previously raise the issue she now raises, and if so, whether she was denied due process of law when the sentencing court allowed the State to amend the repeater allegation (repeater amendment issue) to correct a clerical error. Because we conclude that Peckham did not provide a

sufficient reason for failing to raise the repeater amendment issue previously, she is precluded from raising it now. Section 974.06(4), STATS.; *State v. Escalona-Naranjo*, 185 Wis.2d 168, 185-86, 517 N.W.2d 157, 163-64 (1994). Therefore, we affirm.

A jury found Peckham guilty of criminal damage to property, contrary to §§ 943.01(1) and (2)(d), STATS., 1987-88. The State charged Peckham as a repeat offender because she had been previously convicted of armed robbery.<sup>1</sup> At sentencing, the prosecutor moved to amend the repeater allegation to correct the date of that conviction from August 17, 1983, to August 31, 1983. Peckham's counsel objected and claimed that the prosecutor was bound by the erroneous date in the complaint, although there was no claimed prejudice to Peckham.<sup>2</sup> The trial court overruled the objection and allowed the amendment. Peckham's counsel unsuccessfully sought a new trial, but did not raise the repeater amendment issue. He then filed a no merit report, but again did not raise the repeater amendment as a potential issue. Although Peckham responded to the report, she also did not raise the repeater amendment issue.<sup>3</sup> When we independently reviewed the record, as required by *Anders v. California*, 386 U.S. 738 (1967), and RULE 809.32, STATS., we did not view this repeater amendment as an issue of arguable merit.

In a second postconviction motion, Peckham raised the repeater amendment issue.<sup>4</sup> However, the plain language of § 974.06(4), STATS., requires

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<sup>1</sup> In correspondence filed to this court, Peckham asserts that she was convicted of violating § 943.32(1)(b), STATS., 1981-82, rather than § 943.32(1)(a). However, that error is harmless because that prior conviction, under either statutory subsection, is sufficient to prove that she is a repeater and subject to an enhanced penalty under § 939.62, STATS.

<sup>2</sup> Peckham suffered no prejudice because she was charged as a repeater and the amendment did not change her status as a repeater since both dates were within the five-year statutory period. Section 939.62(2), STATS.

<sup>3</sup> In her brief-in-chief, Peckham asserts that she raised the repeater amendment issue in her response to the no merit report. However, we have reviewed her response and two supplemental responses and conclude that she did not mention this issue.

<sup>4</sup> Peckham bases her claim on *State v. Wilks*, 165 Wis.2d 102, 104, 477 N.W.2d 632, 633 (Ct. App. 1991). However, her claim is refuted by *State v. Gerard*, 189 Wis.2d 505, 514-15, 525 N.W.2d 718, 721 (1995). Peckham does not address *Gerard*.

a defendant who initially raises an issue in a subsequent postconviction motion, to provide a sufficient reason for failing to raise that issue previously to avoid the preclusion of *Escalona-Naranjo*. 185 Wis.2d at 185-86, 517 N.W.2d at 163-64.

Peckham's reason for failing to raise the repeater amendment issue earlier is that she claims to have urged her appellate counsel to raise the issue, but that he refused to do so. The trial court denied the motion because we adopted the no merit report in a per curiam opinion and concluded that there were no appellate issues of arguable merit. *State v. Peckham*, No. 90-2174-CR-NM, unpublished slip op. at 7 (Wis. Ct. App. Jun. 13, 1991).

We conclude that Peckham did not comply with *Escalona-Naranjo's* procedural requirement. Although her excuse for not raising this issue previously is that she is not a lawyer, this did not interfere with her ability to disagree vigorously with appellate counsel on other issues and respond extensively to the no merit report. See RULE 809.32(1), STATS. We conclude that Peckham's reason is insufficient to comply with *Escalona-Naranjo* because she does not explain her failure to raise the repeater amendment issue in her response after appellate counsel refused to raise the issue.

*By the Court.*—Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.